

IN THE HIGH COURT OF SOUTH AFRICA
(Circuit Local Division of the Benoni Circuit District)



Case No: A324/2022

In the matter between

Frans Butana Nkuna

and

The State

JUDGMENT: BAIL APPEAL

A. INTRODUCTION

(1) The matter is before me as an appeal against the refusal of bail by the Magistrate in Soshanguve on 3 November 2022.

(2) The bail application was held in terms of *schedule 6 of act 51 of 1977* as the Appellant is facing a charge of pre-meditated murder which is a schedule 6 offence. The Appellant bore the onus to show the court exceptional circumstances exist which, in the interest of justice, permit his release on bail. Charging a person with a Schedule 6 offence places the burden

on the accused to convince the court that it is not only in the interest of justice, but there are exceptional circumstances that exist which qualify him to be released on bail.

(3) The Appellant was arrested on 26 October 2022 after he presented himself at the police station. He appeared in Soshanguve, in the Regional Division of Tshwane North. The Appellant faces two charges:

- a) Murder.
- b) Defeating the administration of justice.

(4) The notice of appeal was filed late. Condonation for such late filing was applied for, and granted.

B. EVIDENCE FOR THE APPELLANT

(5) An affidavit of the Appellant was submitted in support of this application. It was accepted into the record as exhibit "A".

The affidavit set out the Appellant 's personal circumstances as follows:

- a) He is a 60-year-old male, occupied as a traditional doctor.
- b) He is a SA citizen & has valid identity document.
- c) His permanent residential address is in Soshanguve at a property which he owns. He also owns further property
- d) He will plead not guilty to the charges.
- e) He has 3 children; all are dependent on him.
- f) He is married & his wife is unemployed.
- g) He has handed his passport to the State.

- h) He has no family or assets outside South Africa.
- i) He has no previous convictions.
- j) He has a chronic illness which he self-medicates with traditional medicine.

(6) The Appellant referred to his previous arrest, in some detail, but the court finds that it bears little relevance to this appeal. He has lodged a civil claim against the Minister of Police for damages relating to his previous arrest (on this matter) on 11 October 2020. He was released shortly after his arrest.

(7) He makes the following further allegations in support of his application:

- a) The Appellant alleges that since his previous arrest the community has no faith in him.
- b) The State has no *prima facie* case against him and he will be acquitted.
- c) He could have absconded after the previous arrest if he had the mind to.
- d) He could have tampered with the investigating officer.

C. EVIDENCE FOR THE STATE

(8) The State relied on the affidavit of the investigating officer (Exhibit "B") which contained the following:

- a) This is a premeditated femicide.

- b) He has the statement from Collin Matonsi that the Appellant & Matonsi murdered the deceased in a ritual. They struck her with a hammer and severed her legs & arms from her body (these body parts are yet to be found) then burnt the torso to avoid detection.
- c) Matonsi has been convicted on the same charges as the Appellant & is serving a sentence of 30 years' imprisonment
- d) The hammer has been recovered & found to have the deceased's DNA.
- e) The community has submitted a petition setting out their objection to the Appellant being released on bail.
- f) Matonsi's house and his mother-in-law's house was vandalised by the community. The investigating officer is of the view that the Appellant and his extended family could suffer the same fate.
- g) The Appellant and his family are not safe as the community is enraged.
- h) The killing of women is so prevalent in South Africa that President Ramaphosa held a summit on 1 November 2022 to address the scourge of gender based violence in South Africa.
- i) If found guilty, the Appellant could be sentenced to life imprisonment.

(9) The investigating officer set out the considerations in sec 60(4)(a) and commented on each as follows:

- a) Appellant is a witchdoctor and is powerful and can harm people.
- b) Appellant has an initiation school, earns large sums of money, has money to leave the country.
- c) Witnesses will not feel safe.
- d) Appellant knows high ranking SAPS officers and can access information.
- e) The community is angry and have submitted a petition.

- f) A petition signed by members of the community accepted into the record as exhibit "B"1.

D. LEGISLATION

(10) Section 65(4) of the Act 51 of 1977 reads as follows:

"The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought unless such court or judge is satisfied that the decision was wrong in which event the court or judge shall give the decision which in its or his opinion the lower court should have given."

(11) Section 60(11) (a) of the CPA stipulates, pertaining to schedule 6 offences, that *"the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release"*

(12) The court looked to Sec 60(8A) of Act 51 of 1977 to determine whether the release of the Appellant would disturb the peace or undermine the public peace or security.

Sec 60(8A) reads as follows:

"In considering whether the ground in subsection (4) (e) has been established, the court may, where applicable, take into account the following factors, namely(a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed; (b) whether the shock or outrage of the community might lead to public disorder if the accused is released;

(c) whether the safety of the accused might be jeopardized by his or her release; (d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused; (e) whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system; or (f) any other factor which in the opinion of the court should be taken into account."

E. FINDINGS

(13) I have carefully considered the evidence, arguments and the judgement of the court a quo. The case for the appellant did not contribute to establishing that exceptional circumstances exist that warrant his release on bail. His personal circumstances are neither unusual nor exceptional as to justify the granting of bail.

(14) The appellant's argument contained in the notice of appeal at para 3.24 has no merit. The Appellant wished to continue argument (and provide case law) after the State argued it's case. I find no irregularity in the Magistrate's refusal to allow this. I find that the appellant was granted ample opportunity to present evidence, argue his application and refer to case law.

(15) It was argued that the Appellant's health would be endangered as he is self-medicating with traditional medication. I find no merit in this argument as there is no evidence that the Appellant could not access medication (traditional or allopathic) while in custody. The traditional medicine can be brought to the Appellant while in custody. This therefore does not constitute an exceptional circumstance.

(16) It was also argued that the Appellant's business is likely to suffer if bail is refused, constitutes an exceptional circumstance. This consideration is outweighed by the community's outrage and the risk to the safety of the Appellant and his family. The Appellant tabulated the requirements set out in s 60(4) of Act 51 of 1977 and made a mere bare denial that any of those circumstances exist.

(17) A mere bare denial of the considerations in s 60(4) is insufficient to show exceptional circumstances [S v Botha en n' Ander 2002(1) SACR 222 (SCA) at para 18].

(18) The Investigating officer has testified to the strength of the state's case, which consists of an eye witness/co-perpetrator and scientific evidence (DNA). The Appellant adduced no evidence to cast doubt on the strength of the state's case.

(19) I find that, *prima facie*, the state has a strong case. The Appellant argued that the confession by the previous accused could not be relied upon to indicate the strength of the State's case. In my view there no merit in this argument, as the admissibility of such a statement is to be determined by the trial court.

(20) The Appellant has failed to demonstrate, on a balance of probabilities that he will be acquitted.

(21) The Appellant must prove on a balance of probabilities that he will be acquitted of the charge: S v Botha 2002 (1) SACR 222 (SCA) at 230h, 232c; S v Viljoen 2002 (2) SACR 550 (SCA) at 556c

(22) The home of the other suspect (now sentenced) & his family was vandalised by the community. The State's apprehension that the Appellant's life (and that of his family) would be in danger if he is released on bail, is justified. The Magistrate, correctly, found that the Appellant had an incentive to flee, in the light of the fact that his life was in danger.

(23) The Appellant argued that the Magistrate misdirected himself by removing the Appellant from the court. It appears that the Magistrate ordered the Appellant to be moved out of reach of the public, not out of the court. The Magistrate was best placed to observe & gauge the outrage of the community. The Magistrate made 1st hand observation of the public's revulsion and alarm at the violent murder of the deceased. I can therefore rely on the Magistrate's impression of the heightened emotions in the court. I find no misdirection in the Magistrate's instruction, the Magistrate acted in the best interests of the Appellant.

(24) The nature of the offences and the circumstances under which the offences were committed induced a sense of shock and outrage in the community. This offence was particularly violent and brutal. Further, femicide has become so widespread that President Ramaphosa was compelled to hold a summit to address this crime.

(25) The sense of peace and security of the community at large will be undermined and jeopardized by the release of the Appellant on bail [S v Miselo 2002(1) SACR 649 (C) at para 23-29].

In my view, the release of the appellant on bail will undermine the public confidence in the criminal justice system.

(26) There is nothing in the Appellant's application to qualify, on a balance of probabilities, as exceptional circumstances. *[S v Scott-Crossley 2007(2) SACR 470 (SCA) at para 12]*, See also *S v Dlamini 1999(2) SACR 519 (C)*

I find that the Appellant failed to establish exceptional circumstances exist that permit his release on bail. He has failed to prove that the decision of the regional Magistrate was wrong.

(27) I am not convinced that the court a quo misdirected itself materially on the facts or the legal principles or that it exercised its discretion incorrectly by dismissing Appellant's bail application.

(28) The appeal is dismissed.



R Bhika AJ

Acting Judge of the High Court of South Africa

North Gauteng Division, Pretoria

Appearances:

For the Appellant: Nemaxwi Attorneys

For the Respondent: Adv. L.A More, DPP Pretoria

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